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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1905.

No. [illegible]8.13

ILLINOIS CENTRAL RAILROAD COMPANY,
Plaintiff in Error,

vs.

J. U. McKENDREE,
Defendant in Error.

In Error to the Circuit Court of Carlisle County, State of Kentucky.

BRIEF IN BEHALF OF PLAINTIFF IN ERROR.

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BRIEF IN BEHALF OF PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

The question involved in this case is whether an interstate carrier is liable to a civil action for violating a regulation of the Secretary of Agriculture forbidding the transportation of cattle northwards across a certain line running through the body of the State of Tennessee.

Defendant in error February 3, 1904, sued plaintiff in error, a common carrier operating a railroad from New Orleans to Chicago, through Carlisle County, Ken-

tucky, claiming that on July 11, 1903, plaintiff in error received one or more cars of infected cattle, and transported them to Arlington, in Carlisle County, Kentucky, and unloaded them July 13, 1903, in its stock pens in said town, where cattle running on the commons, "where they had a right to run," could and did come in contact with the infected cattle and contracted Texas Cow Fever. "That the company knew, or could have known with reasonable care" that the cattle had infectious germs when unloaded. "They having brought them from an infected district, knowing and in open conflict with well known quarantine laws," and that while in said stock pens defendant's cows came into contact with them and contracted the fever, to his damage in the sum of eighty dollars. (Rec., 1.)

February 23, 1904, the general demurrer of plaintiff in error filed February 19, 1904, being overruled, it filed its answer traversing the allegations of the petition. (Rec., 3.)

June 8, 1904, plaintiff in error filed an amended answer, as follows:

"Further answering herein, the defendant says that the claims of the plaintiff herein asserted are based upon a certain alleged act of Congress of the United States of America approved February 2, 1903, 'entitled an act to enable the Secretary of Agriculture to more effectually suppress and prevent spread of contagious and infectious diseases of live stock and for other purposes,' which act is published and contained in volume 32 United States Statutes at Large, beginning at page 791, and also in a supplement to the United States Compiled Statutes issued in 1903, by the West Publishing Company, St. Paul, Minnesota, beginning at page 372 of said volume, and said claims are further based upon certain alleged regulations adopted

and promulgated by the Secretary of Agriculture on March 13, 1903, pursuant to the authority attempted to be conferred upon him by said alleged act of Congress above mentioned approved February 2, 1903.

"The defendant says that said act of Congress hereinbefore mentioned and said regulations adopted by the Secretary of Agriculture as hereinbefore stated are each and all of them repugnant to and in contravention of the Constitution of the United States of America and is in excess of the powers of Congress and of the Secretary of Agriculture under the Constitution of the United States, and they are each and all, therefore, unconstitutional and void, and under the Constitution of the United States this defendant has the right, privilege and immunity of being exempt from the assertion or prosecution of any claims against it based upon or arising under such act of Congress or said regulations, or any of them, and this defendant as permitted by Section 709 of the Revised Statutes of the United States, hereby specially sets up and claims and pleads in defense of this action the right and privilege and immunity which is secured to it by the Constitution of the United States to be exempt from all suits and prosecutions and all claims against it based upon or arising under such unconstitutional and void act of Congress and regulations adopted or promulgated by the Secretary of Agriculture." (Rec., 3, 4.)

June 8, 1904, defendant in error filed a general demurrer to the answer as amended. (Rec., 4.)

June 10, 1904, he filed an amended petition, the affirmative allegations whereof were controverted. The petition is as follows (Rec., 5):

"The plaintiff, J. U. McKindree, comes and by leave of the court amends his petition and says, that the defendant, Illinois Central Railroad Company, on the 13th day of June, 1903, received one car of cattle at Grand Junction, Tennessee, to be transported to the Town of Arlington, Kentucky, and on the 13th day

of said month unloaded them in the stock pens in *said* town.

That the Town of Arlington is a small town, located on defendant's road in this, Carlisle County, and defendant's stock pens are located adjacent to the public highway, and commons, and that Grand Junction, Tennessee, is located on defendant's road and south of the quarantine line that was established on the 14th day of March, 1903, by and under the existing quarantine laws, and that said quarantine line, 'beginning on the Mississippi River at the southeast corner of the State of Missouri at the western boundary of Tennessee. [Here follows a description of the quarantine line through the body of the State of Tennessee as set forth in amendment No. 4 to B. A. I. Order No. 107, which will be found at Rec., 34.] And that the defendants received said cattle south of said quarantine line, and transported them north and out of a quarantine district, and south of the said quarantine line, and transported them north through the State of Tennessee into this county and state, and unloaded them in the Town of Arlington and placed them in their stock pens adjacent to the public highway and commons, where plaintiff's cows came in contact with the germ of Texas cow fever that said cattle had on them when put in the pens as aforesaid; that said stock pens were suffered and permitted to remain open and exposed to cattle after the removal of said cattle without disinfecting, or any other effort to protect exposed stock, and plaintiff's cows contracted Texas cow *fever* from said germs produced from said cattle while in said stock pens, to the damage of plaintiff.

Wherefore he prays as in his original petition."

On June 16, 1904, the demurrer to the amended answer of plaintiff in error was sustained, to which it excepted, and issue being joined, the jury was sworn, a trial had, and a verdict for defendant in error returned, upon which the court rendered judgment for

sixty-five ($65) dollars, with interest from October 24, 1904, and costs. (Rec., 12 and 13.)

October 24, 1904, plaintiff in error filed grounds for a new trial. (Rec., 7, 8.)

The motion for a new trial was overruled October 25, 1904, and bill of exceptions filed November 4, 1904. (Rec., 8.)

The court instructed the jury (Nos. 1, 2 and B) as follows:

"The court instructs the jury that if they believe from the evidence that the cattle shipped to Arlington, Kentucky, from Grand Junction, Tennessee, by J. A. Jones through the defendant, Illinois Central Railroad Company, were infected with the disease known as Texas fever and that through and by reason of such disease, if any, of said Jones' cattle, the two cows of plaintiff were infected and died therefrom, then you will find for plaintiff the reasonable cash value of said two cows, not exceeding the sum of eighty dollars. (*Given.*)"

No. 2 in words and figures as follows:

"The court instructs the jury that unless you believe from the evidence plaintiff's cows caught an infectious disease from the Jones cattle and died therefrom, the law is for the defendant, and you should so find, although you may further believe from the evidence that the Jones cattle had the infectious disease known as Texas fever. (*Given.*)"

(To the giving of which instructions defendant objected and excepted.)

And the court on the motion of the defendant gave instruction "B" to the jury, which is in words and figures as follows:

"The court instructs the jury that they cannot find for plaintiff unless the cattle shipped by J. A. Jones

over defendant's railroad and unloaded at Arlington had Texas fever or Texas ticks; nor can the jury find for plaintiff, although they may believe said Jones' cattle were infected by Texas fever or Texas ticks, unless they further believe that plaintiff's cattle contracted the disease from said Jones' cattle, while the latter were in the pens of defendants at Arlington. (*Given.*)"

December 23, 1904, the presiding judge filed in the office of his clerk his certificate, as follows:

"I, R. J. Bugg, sole presiding judge of the Circuit Court of Carlisle County, in the State of Kentucky, now and at the time of the trial of the above entitled cause, do hereby certify:

That upon the trial of said cause the defendant, Illinois Central Railroad Company, relied for its defense upon certain rights, privileges and immunities specially claimed by it under the Constitution of the United States of America, and it insisted upon its said rights, privileges and immunities throughout the trial of said action and in the assertion of them it claimed and contended that the various regulations and orders made and promulgated by the Secretary of Agriculture and offered in evidence on behalf of the plaintiff herein over the objections of defendant were unconstitutional, null and void as being in excess of the powers conferred or which could be conferred by act of Congress upon the Secretary of Agriculture under the Constitution of the United States of America, and that the said act of Congress approved February 2, 1902, under which the Secretary of Agriculture assumed to promulgate said orders and regulations was itself unconstitutional, null and void as being in conflict with the Constitution of the United States of America and in excess of the powers conferred by it upon the Congress.

"Said defendant, Illinois Central Railroad Company, further contended throughout the trial of said cause that no right of action against it accrued to the plaintiff by reason of any of the alleged regulations or orders made or promulgated by the Secretary of Agri-

culture, and offered in evidence upon the trial of this action, or by reason of the alleged failure on the part of the defendant to observe or to comply with any of said regulations or orders on the ground that the said regulations or orders did not assume or attempt to give, and that the said act of Congress did not assume or attempt to give, to the plaintiff herein or to any other in like situation a remedy by way of civil action against the defendant herein for its alleged breach of any of said regulations or orders made or promulgated by the Secretary of Agriculture, and throughout the trial of said action the defendant, Illinois Central Railroad Company, specially set up and claimed, even if said act of Congress and said regulations and orders were valid under the Constitution and laws of the United States, still it had a right, privilege or immunity under the said act of Congress or the said regulations or orders from any liability to the plaintiff, J. U. McKendree, in a civil action for damages claimed on account of its alleged breach of said regulations or orders.

"In allowing the said regulations or orders of the Secretary of Agriculture to be given in evidence before the jury and in overruling the motion of defendant to peremptorily instruct the jury to return a verdict in its favor, the Carlisle Circuit Court disallowed the various contentions made as above stated on behalf of the Illinois Central Railroad Company, and denied the claims made by it of the rights, privileges or immunities specially claimed by it as above stated, and held that the various claims made by it were not well founded in law under the Constitution and laws of the United States of America, and the claims of the plaintiff herein was established and a judgment in his favor rendered solely by reason of defendant's alleged breach of said regulations and orders.

"I do further certify that under the laws of the State of Kentucky the Carlisle Circuit Court is the highest court of said state in which said cause can be reviewed or tried or decision therein had, and that there is no court of the State of Kentucky having jurisdiction

under its laws to review or reverse its judgment in this cause.

"Given under my hand as sole presiding judge of the Carlisle Circuit Court during the entire time of the pendency of the above entitled cause in said cause, this 21st day of December, 1904."

As appears by said certificate, Hon. R. J. Bugg was sole presiding judge of the Carlisle Circuit Court, the court of last resort in the state in cases involving the amount of judgment.

December 23, 1904, plaintiff in error sued out its writ of error (Rec., 11) and filed its assignment of errors as hereinafter recited (Rec., 24, *et seq.*).

December 21, 1904, the writ of error was duly allowed. (Rec., 15.)

By the testimony it appeared that the cows of plaintiff below ran on the "commons," the land belonging to plaintiff in error. (Testimony of defendant in error, Rec., 19.) That they were supposed to have come in contact in some way with the cattle transported by plaintiff in error from Grand Junction, a point south of the quarantine line described in the amended petition of defendant in error, and transported to Arlington aforesaid in Kentucky.

There was no evidence that the cattle were infected when received for transportation, nor that plaintiff in error had any intimation of any such infection, nor any guilt of anything except receiving cattle from a point south of the quarantine line established by the Department of Agriculture for transportation to a point north of said line. No question of negligence was involved, or of liability, apart from the violation of quarantine regulations.

March 13, 1903 (Rec., 25) the Secretary of Agriculture promulgated B. A. I. Order 107, establishing a quarantine line from west to east throughout the United States from California to Maryland, and forbidding the transportation of cattle from points south to points north of said line, except as in said order specified. (Rec., 26.)

By Section 9 of said order (Rec., 28) it is provided:

"Violation of these regulations is punishable by a fine of not less than one hundred dollars nor more than one thousand dollars, or by imprisonment not more than one year, or by both such fine and imprisonment."

No right of action is afforded by any provision of the order to anyone injured by violation of the order.

By amendment No. 4, March 14, 1904 (Rec., 34), it is provided that the quarantine line established, and the legislation to enforce it, by the State of Tennessee, being satisfactory to the Secretary of Agriculture, is adopted as the Federal quarantine line. The line thus adopted runs from west to east through the State of Tennessee, *not conforming to any boundary of said state.* B. A. I. order number 107 and amendments 1 to 15 to said order were admitted in evidence for the plaintiff over the defendant's objection and exception. (Rec., 24-43.)

The United States statute pursuant to which these orders or regulations are made is the Act of February 2, 1903, c. 349 (32 Stat. L., 791), United States Compiled Statutes, 1901, Supp. 1905, page 613, as follows:

"Be it enacted, etc., that in order to enable the Secretary of Agriculture to effectually suppress and extirpate contagious pleuropneumonia, foot and mouth disease, and other dangerous, contagious, infectious

and communicable diseases in cattle and other live stock, and to prevent the spread of such diseases, the powers conferred on the Secretary of the Treasury by sections four and five of an act entitled 'An Act for the establishment of a Bureau of Animal Industry, to prevent the exportation of diseased cattle, and to provide means for the suppression and extirpation of pleuropneumonia and other contagious diseases among domestic animals,' approved May 29, 1884 (23 United States Statutes, 31), are hereby conferred on the Secretary of Agriculture, to be exercised exclusively by him. He is hereby authorized and directed, from time to time, to establish such rules and regulations concerning the exportation and transportation of live stock from any place within the United States where he may have reason to believe such diseases may exist into and through any state or territory, including the Indian Territory, and into and through the District of Columbia and to foreign countries, as he may deem necessary, and all such rules and regulations shall have the force of law. Whenever any inspector or assistant inspector of the Bureau of Animal Industry shall issue a certificate showing that such officer had inspected any cattle or other live stock which were about to be shipped, driven, or transported from such locality to another, as above stated, and had found them free from Texas or splenetic fever infection, pleuropneumonia, foot and mouth disease, or any other infectious, contagious, or communicable disease such animals so inspected and certified may be shipped, driven or transported from such place into and through any state or territory, including the Indian Territory, and into and through the District of Columbia, or they may be exported from the United States without further inspection or the exaction of fees of any kind, except such as may at any time be ordered or exacted by the Secretary of Agriculture; and all such animals shall at all times be under the control and supervision of the Bureau of Animal Industry of the Agricultural Department for the purposes of such inspection.

"Sec. 2. That the Secretary of Agriculture shall

have authority to make such regulations and take such measures as he may deem proper to prevent the introduction or dissemination of the contagion of any contagious, infectious, or communicable disease of animals from a foreign country into the United States or from one state or territory of the United States or the District of Columbia to another, and to seize, quarantine, and dispose of any hay, straw, forage, or similar material, or any meats, hides, or other animal products coming from an infected foreign country to the United States, or from one state or territory or the District of Columbia in transit to another state or territory or the District of Columbia whenever in his judgment such action is advisable in order to guard against the introduction or spread of such contagion.

"Sec. 3. That any person, company or corporation knowingly violating the provisions of this act or the orders or regulations made in pursuance thereof shall be guilty of a misdemeanor, and on conviction shall be punished by a fine of not less than one hundred dollars nor more than one thousand dollars, or by imprisonment not more than one year, or by both such fine and imprisonment."

The following stipulation of counsel appears at Rec. 45:

"This cause with the consent of this court shall be heard and determined in this court only upon the following Federal questions, viz.:

First. As to the validity of the act or acts of Congress so far as same might be construed as purporting to delegate to the Secretary of Agriculture power to make or promulgate the regulations actually made by him shown in the record herein as the basis of the claims asserted by the defendant in error against the plaintiff in error, it being contended on behalf of the plaintiff in error and denied by the defendant in error that such acts of Congress if so construed are in excess of the powers conferred upon Congress by the Constitution of the United States, and for that reason null and void.

Second. As to the power of the Secretary of Agriculture or of the acting Secretary of Agriculture under the Constitution of the United States or the acts of Congress aforesaid to make or promulgate the regulations actually made and promulgated by them shown in the record herein as the basis of the claims asserted by the defendant in error against the plaintiff in error.

Third. As to whether or not under the acts of Congress and the regulations set forth in the record herein the defendant in error had or has any right to maintain a civil action against the plaintiff in error for the subject-matter claimed by him in this cause.

Such Federal questions upon which this cause shall be heard and determined in this court are more fully set forth in the certificate filed herein by R. J. Bugg, presiding judge of the Carlisle Circuit Court, before the allowance of the writ of error herein. All other questions are hereby expressly waived by the parties so far as they have power to waive same."

ASSIGNMENT OF ERRORS.

I.

"Said Carlisle Circuit Court for Carlisle County, Kentucky, erred to the prejudice of the plaintiff in error, Illinois Central Railroad Company, in allowing the defendant in error, J. U. McKendree, over the objections of the plaintiff in error to offer and give in evidence before the jury upon the trial of the above mentioned cause in the said Carlisle Circuit Court the said orders and regulations made and promulgated by the Secretary of Agriculture of the United States of America and amendments thereto made and promulgated by the said Secretary of Agriculture and by the acting Secretary of Agriculture of the United States of America which orders and regulations were and are designated as B. A. I. order No. 107 made and promulgated by the

Secretary of Agriculture on March 13, 1903, and the amendments thereto numbered respectively 1 to 15, both inclusive, made and promulgated respectively on March 14, 1903, May 5, 1903, September 1, 1903, September 24, 1903, and October 20, 1903, by the said Secretary of Agriculture and the said acting Secretary of Agriculture—in or by which said orders or regulations above mentioned it was attempted to be provided that a Federal quarantine line should be established across the United States of America running in an irregular manner from the Pacific ocean to the Atlantic ocean and extending through the State of Tennessee in a generally eastwardly and westerly direction in such a manner as to divide said State of Tennessee into two parts, and in and by which said orders and regulations and amendments thereto it was attempted to be provided that the transportation of cattle from the area south of or below said Federal quarantine line above mentioned to any portion of the United States above, north, east or west of said Federal quarantine line should be prohibited and forbidden except upon certain conditions and subjected to certain restrictions and regulations therein prescribed.

Said Carlisle Circuit Court further erred in said matter in permitting defendant in error upon the trial of said cause to give in evidence over the objections of plaintiff in error, each and every one of the regulations or orders or amendments thereto made and promulgated as above set forth.

To such ruling of the Carlisle Circuit Court in permitting each and all of said orders and regulations and amendments thereto to be given in evidence at the trial of said action the plaintiff in error throughout the trial objected and excepted and it still objects and excepts thereto.

II.

Said Carlisle Circuit Court further erred in said matter in sustaining the demurrer of the defendant in error, J. U. McKendree, to so much of the answers

as amended of the plaintiff in error, Illinois Central Railroad Company, as specially set and claimed rights, privileges and immunities under the Constitution and under the laws of the United States of America, to which ruling of the said court plaintiff in error objected and excepted throughout the trial and still objects and excepts.

III.

Said Carlisle Circuit Court further erred in said matter in holding and deciding against the protest and objections of the plaintiff in error, Illinois Central Railroad Company, that the said Secretary of Agriculture was empowered under the act of Congress approved February 2, 1903, entitled 'An act, to enable the Secretary of Agriculture to more effectually suppress and prevent the spread of contagious diseases of live stock, and for other purposes' (which act is published and contained in volume 32 United States Statutes at Large, beginning at page 791), to adopt or promulgate or enforce any or all of the regulations or orders aforesaid or amendments thereto and in so holding and deciding the said Carlisle Circuit Court for Carlisle County, Kentucky, erred in denying the contentions made throughout the trial of said action on behalf of plaintiff in error to the effect that under the Constitution of the United States of America it had a privilege and immunity and exemption from any liability or proceeding of any character based upon the orders and regulations aforesaid.

IV.

Said Carlisle Circuit Court further erred in said matter in holding and deciding against the protest and objections of the plaintiff in error, Illinois Central Railroad Company, that the Congress of the United States of America is or was empowered by the Constitution of the United States of America to confer upon

the Secretary of Agriculture authority to adopt or to promulgate or to enforce the said orders, rules or regulations, or any of them, or any amendments thereto, and in so holding and deciding the Carlisle Circuit Court erred to the prejudice of the plaintiff in error, Illinois Central Railroad Company in denying the claims specially set up by it throughout the trial of said action to a privilege, immunity and exemption specially claimed by it under the Constitution of the United States from any liability or proceeding under any of the orders, rules and regulations aforesaid.

V.

Said Carlisle Circuit Court further erred in said matter to the prejudice of the plaintiff in error, in holding and deciding that any cause of action whatever accrued to the defendant in error, J. U. McKendree by reason of any alleged violation or breach of any of the orders, rules and regulations aforesaid or amendments thereto even if same could be regarded or treated as valid. In so doing the Carlisle Circuit Court denied the contentions made on behalf of the plaintiff in error, Illinois Central Railroad Company, throughout the trial of said cause, and denied its claim of exemption from any proceeding under the Constitution or laws of the United States of America by reason of the facts alleged or sought to be proven by the defendant in error, J. U. McKendree, upon the trial of said action, which said rights, privileges and exemptions were specially set up and specially claimed by the plaintiff in error throughout the trial of said action in the Carlisle Circuit Court.

VI.

Said Carlisle Circuit Court further erred in said matter to the prejudice of the plaintiff in error, Illinois Central Railroad Company, in rendering a judgment in favor of the defendant in error, J. U. McKen-

dree, against the said plaintiff in error for the sum of sixty-five dollars ($65.00) and interest or for any sum based upon the claim of a failure on the part of plaintiff in error to observe or to comply with the rules, regulations and orders on amendments thereto promulgated as aforesaid by the Secretary of Agriculture and by the Acting Secretary of Agriculture."

BRIEF.

THE JURISDICTION OF THE COURT.

Upon the question of jurisdiction the case is very similar to *Missouri, Kansas & Texas Railway* v. *Haber*, 169 U. S., 613, 621 (1898). In that case an action for damages was brought in a Kansas court on account of the communication of Texas fever to the plaintiff's cattle. The action was based upon a Kansas statute authorizing it and covering cattle transported from other states. At page 621 this court said:

"1. The answer of the railway company as well as its requests for instructions, and the opinion of the Supreme Court of the State, show that the company contended throughout this litigation that legislation by Congress and the regulations prescribed by the Secretary of Agriculture in execution of the Animal Industry Act, furnished a complete defense to all claims for damages asserted in this action. That contention was overruled by the trial court, as well as by the Supreme Court of the State. If the contention of the railway company had been sustained, the verdict and judgment must have been in its favor without reference to any other question in the case. In other words, the state court could not properly have disposed of the case without deciding the Federal question raised by the company. This court therefore has jurisdiction to inquire whether the Supreme Court of Kansas erred in holding that the legislation of Congress and the regulations of the Secretary of the Interior gave to the railway company the right, privilege and immunity specially set up and claimed by it. The motion to dismiss for want of jurisdiction in this court is consequently overruled. *Wilson* v. *Black Bird Creek Marsh Co.*, 2 Pet., 245, 251; *Chicago Life Ins. Co.* v. *Needles*, 113 U. S., 574, 579; *Sayward* v. *Denny*, 158 U. S., 180, 184; *Chicago, Burlington & Quincy Railroad* v. *Chicago*, 166 U. S., 226, 232."

In that case the recovery based upon the Kansas statute was sustained. In the case at bar the action is not based upon a state statute nor upon the common law, but upon violation of Federal quarantine regulations. (Original Complaint, Rec., 1; Amended Complaint, Rec., 5.)

The defendant demurred generally to the original petition. (Rec., 2.) The demurrer being overruled the defendant specially answered that the quarantine regulations adopted by the Secretary of Agriculture were repugnant to the Constitution of the United States, and in accordance with Sec. 709 of the United States Rev. Stat. specially claimed the right, privilege and immunity of exemption from any claims based upon the act of Congress or the regulations made thereunder. (Rec., 4.) The federal questions were also raised by the admission in evidence of the regulations in question (Rec., 24), and by the instructions of the court imposing absolute liability in case the cattle brought from Tennessee to Kentucky by the defendant were in fact infected and imparted Texas fever to the plaintiff's cows. (Rec., 9.) The same questions are raised by the motion for a new trial. (Rec., 8.) The certificate of the presiding judge also shows that the defendant set up and claimed its rights, privileges and immunities under the Constitution and laws of the United States. (Rec., 10.)

The clause of the Constitution involved in the case is "The Congress shall have power * * * to regulate commerce with foreign nations, among the several states, and among the Indian tribes." (Art. 1, Sec. 8, Par. 3.)

It was said by Mr. Justice Harlan in delivering the opinion of the court in the case of *Reid* v. *Colorado*, 187 U. S., 137, 151 (1902):

"Now, it is said that the defendant has a right under the Constitution of the United States to ship live stock from one state to another state. This will be conceded on all hands. But the defendant is not given by that instrument the *right* to introduce into a state, against its will, live stock affected by a contagious, infectious or communicable disease, and whose presence in the state will or may be injurious to its domestic animals. The state—Congress not having assumed charge of the matter as involved in interstate commerce—may protect its people and their property against such dangers, taking care always that the means employed to that end do not go beyond the necessities of the case or unreasonably burden the exercise of privileges secured by the Constitution of the United States."

The case at bar is one where no state statute is involved, where neither Congress nor the State Legislature has conferred the right of action claimed by the plaintiff, and where the defendant's constitutional right, to ship live stock from one state to another so far as not forbidden by law, was denied. The defendant claims nothing more than that, until forbidden by a valid law either of the United States or of the state, the defendant has the right in transacting interstate commerce to bring cattle from Tennessee into Kentucky, which cattle the defendant did not know, or have reasonable ground to know, were infected.

The defendant's right is based not only upon the Constitution of the United States, but also upon Section 5258 of the Revised Statutes, the first sentence of which is as follows:

"Every railroad company in the United States, whose road is operated by steam, its successors and

assigns, is hereby authorized to carry upon and over its road, boats, bridges and ferries, all passengers, troops, government supplies, mails, freight, and property on their way from any state to another state, and to receive compensation therefor, and to connect with roads of other states so as to form continuous lines for the transportation of the same to the place of destination."

Under this statute the defendant claims simply that until forbidden to do so by some valid law it is not liable for transporting live stock from one state to another state in the absence of negligence, although in fact such stock may have been infected or likely to communicate disease.

The Federal questions presented by the record are really four in number.

First. The defendant not being negligent is entitled to immunity from liability on account of the transportation of live stock from one state to another in the absence of any valid law or regulation imposing liability therefor.

Second. The defendant in the transaction of interstate commerce has the privilege or immunity of exemption from regulations of interstate commerce made not by Congress, but by the Secretary of Agriculture.

Third. The defendant under the circumstances described is also entitled to exemption from regulations of commerce by any Federal authority which regulate intra-state commerce as well as interstate commerce.

Fourth. The defendant acting without negligence is entitled to exemption from any civil action on account of doing the acts forbidden by the Secretary of

Agriculture under the particular statutes of February 2, 1903, and May 29, 1884.

Since the passage quoted from the opinion of Justice Harlan in the case of *Reid* v. *Colorado, supra,* it seems unnecessary to accumulate authorities upon the proposition that (no question of negligence arising) except as forbidden by a valid law the defendant had the right under the Constitution of the United States to transport live stock from Tennessee to Kentucky. The appellant will therefore address itself directly to the proposition that the statutes and regulations relied upon as depriving the defendant of this privilege in the particular case are not sufficient to deprive the defendant of this right or to justify an action against the defendant for its exercise. The discussion naturally divides itself into three heads.

1. Congress had no power to delegate to an executive officer, or any other officer, the right to prescribe an offense against the United States or a penalty for commission of such offense.

2. If Congress had power to delegate to an executive officer the authority to prescribe an offense against the United States, such authority must be exercised within the constitutional limits of congressional power, which in this instance is circumscribed by the limits of the authority of Congress to regulate commerce among the several states.

3. A just construction of the Acts of Congress above cited and the regulations of the executive officers aforesaid enacted pursuant to such Acts of Congress, if valid at all, are enforceable only through the imposition

of penalties, and confer no right of private action upon any individual supposed to be injured by violation of such statutes or regulations.

I.

Our first proposition involves two elementary principles, namely, that Congress being entrusted by the Constitution with the legislative power of the United States, must exercise, and not delegate it; and that if it could delegate it, it could not confide it to an executive officer. See *Hayburn's Case*, 2 Dallas., 410 (1792).

In *Morrill* v. *Jones*, 106 U. S., 466 (1882), this court held that the Secretary of the Treasury could not be authorized to alter or amend, by his regulations, a revenue law nor insert into a statute a limitation which Congress did not prescribe. Congress, by statute, exempted from duty animals imported for breeding purposes, under such regulations as the Secretary of the Treasury might prescribe. The Secretary directed customs officers to admit animals only when satisfied that they were "of superior stock, adapted to improving the breed in the United States." This court holding unauthorized the action of the Secretary, said (page 467):

"The Secretary of the Treasury cannot, by his regulations, alter or amend a revenue law. All he can do is to regulate the mode of proceeding to carry into effect what Congress has enacted. In the present case, we are entirely satisfied the regulation acted upon by the collector was in excess of the power of the Secretary. The statute clearly includes animals of all classes. The regulation seeks to confine its operation to animals of 'superior stock.' This is manifestly an

attempt to put into the body of the statute a limitation which Congress did not think it necessary to prescribe. Congress was willing to admit, duty free, all animals specially imported for breeding purposes; the Secretary thought this privilege should be confined to such animals as were adapted to the improvement of breeds already in the United States. In our opinion the object of the Secretary could only be accomplished by an amendment of the law. That is not the office of a treasury regulation."

In *Field* v. *Clark*, 143 U. S., 649, 692 (1891), this court, considering the Tariff Act of October 1, 1890, declared:

"That Congress cannot delegate legislative power to the President is a principal universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution."

But, held that the act in question did not violate the principle; that what the President was by the Act required to do was simply in execution of the Act. It said (693):

"It was not the making of law. He was the mere 'agent of the law-making department to ascertain and declare the event upon which its expressed will was to take effect. * * * The true distinction,' as Judge Ranney, speaking for the Supreme Court of Ohio, has well said, 'is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made.' "

After reviewing the authorities indicating what power could be confided by the legislature to other persons, this court, citing *Locke's Appeal*, 72 Penn. St., 491, 498, continued (694):

"The proper distinction, the court said, was this:

'The legislature cannot delegate its power to make a law; but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend. To deny this would be to stop the wheels of government. There are many things upon which wise and useful legislation must depend which cannot be known to the law-making power, and, must, therefore, be a subject of inquiry and determination outside of the halls of legislation.' "

In *United States* v. *Eaton*, 144 U. S., 677 (1892), Eaton was indicted for violating a regulation of the Commissioner of Internal Revenue, sanctioned by the Secretary of the Treasury, for enforcing the Act of Congress of August 2, 1886, covering the manufacture and sale of oleomargarine. The Circuit Court certified to this court questions upon which the judges were divided in opinion, *viz.:*

1. Whether a wholesale dealer in oleomargarine knowingly failing to keep a book showing the oleomargarine received, from whom received, that disposed of, and to whom sold as required by the commissioner's ruling, was liable to the penalty imposed by the Act.

2. Whether such dealer failing to make monthly returns to the collector showing such facts was liable to the penalty.

The commissioner was empowered by the Act to make "all needful regulations" for carrying the act into effect. The commissioner had prescribed that wholesale dealers in oleomargarine should keep a certain book, and make monthly returns showing the oleomargarine received, from whom received, that sold and to whom sold. *Section 5* of the statute required the

wholesale dealer to keep such books as the commissioner demanded, but imposed no penalty for failure so to do.

This court, therefore, stated the question to be (686):

"The question, therefore, is whether a wholesale dealer in oleomargarine, who omits to keep the books, or to render the returns prescribed by the regulation made under the authority of Sec. 20 of the Act, is liable to the penalty prescribed by Section 18, as having omitted or failed to do a thing 'required by law in the carrying on or conducting of his business' within the meaning of Section 18."

This court said:

"Section 20 of the Act in question would be fully carried out by making regulations of the character of those provided for in Section 161 and Section 251 of the Revised Statutes, without extending the provision of Section 18 so as to make a criminal offense, as a neglect to do a thing 'required by law' of a neglect to do a thing required only by a regulation of the Commissioner of Internal Revenue."

After reviewing *Morrill* v. *Jones*, *supra*, this court said (687):

"Much more does this principle apply to a case where it is sought substantially to prescribe a criminal offense by the regulation of a department. It is a principle of criminal law that an offense which may be the subject of criminal procedure is an act committed or omitted 'in violation of a public law, either forbidding or commanding it.'

It would be a very dangerous principle to hold that a thing prescribed by the Commissioner of Internal Revenue, as a needful regulation under the Oleomargarine Act, for carrying it into effect, could be considered as a thing 'required by law' in the carrying on or conducting of the business of a wholesale dealer in oleomargarine, in such manner as to become a crim-

inal offense punishable under Section 18 of the Act; particularly when the same Act, in Section 5, requires a manufacturer of the article to keep such books and render such returns as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may, by regulation, require, and does not impose, in that section or elsewhere in the Act, the duty of keeping such books and rendering such returns upon a wholesale dealer in the article.

It is necessary that a sufficient statutory authority should exist for declaring any act or omission a criminal offense; and we do not think that the statutory authority in the present case is sufficient. If Congress intended to make it an offense for the wholesale dealers in oleomargarine to omit to keep books and render returns as required by regulations to be made by the Commissioner of Internal Revenue, it would have done so distinctly, in connection with an enactment such as that above recited, made in Section 41 of the Act of October 1, 1890.

"Regulations prescribed by the President and by the heads of departments, under authority granted by Congress, may be regulations prescribed by law, so as to lawfully support acts done under them and in accordance with them, and may thus have, in a proper sense, the force of law; but it does not follow that a thing required by them is a thing so required by law as to make the neglect to do the thing a criminal offense in a citizen, where a statute does not distinctly make the neglect in question a criminal offense."

In *United States* v. *Waters*, 133 U. S., 208, 213 (1890), this court held that the Attorney General had no power to revise the ruling of a court in making an allowance of a fee to a district attorney.

In *Ex parte Kollock*, 165 U. S., 526, 538, a case arising under the aforesaid Act of August 2, 1886, this court found that the offense of which Kollock was accused was fully defined by the statute, and that the regulation by the commissioner was in

execution of, or supplementary to, but not in conflict with the law itself. The case of *U. S.* v. *Eaton*, above cited, was reviewed and distinguished.

Both in the State and Federal courts a great number of decisions may be found to the same effect. Reference will be made to a few of them which bear more immediately upon the matter in hand.

In *U. S.* v. *Blasingame*, 116 Fed. Rep., 654 (1900), it was held that Congress had no power to confer upon the Secretary of the Interior authority to make rules and regulations for the protection of forest reservations, the violation of which would be a criminal offense, under the Act of June 4, 1897. (30 Stat. L., 11, 35; 2 U. S. Comp. St. 1901, p. 1540), citing decisions of the Supreme Court of the United States already referred to and also the following interesting series of California decisions:

People v. *Parks*, 58 Cal., 624, 643 (1881).
Ex parte Cox, 63 Cal., 21 (1883).
Board of Harbor Commissioners v. *Excelsior Redwood Co.*, 88 Cal., 491, 493 (1890), 26 Pac. Rep., 375; 22 Am. St. Rep., 321.

The case of *Ex parte Cox*, which relates to a quarantine for the protection of vineyards, is closely analogous to the case at bar.

In *Dent* v. *U. S.*, 71 Pac. Rep., 920 (1903), the Supreme Court of Arizona in an elaborate opinion also held the Act of June 4, 1897, invalid in so far as it might be considered to authorize the Secretary of the Interior to make certain acts criminal offenses which would not be otherwise punishable as such.

Under the Act of June 4, 1897, however, regulations by the Secretary of the Interior have been sustained in so far as to permit the United States to prevent by injunction pasturing of sheep on a forest reservation without the permission of the Secretary. *U. S.* v. *Dastervignes et al.*, 118 Fed. Rep., 199 (1902), same case on appeal to the Circuit Court of Appeals for the 9th Circuit, 122 Fed. Rep., 30 (1903). Such a bill might very well be maintained upon the basis of the proprietary rights of the United States and its power as representing the public to prevent irreparable trespass. Compare *In re Debs*, 158 U. S., 564 (1895).

In *State ex rel. Adams* v. *Burdge et al.*, 95 Wis., 390 (1897), 37 L. R. A., 157, it was held that the legislature cannot delegate to the State Board of Health power to enact a regulation excluding from the public schools children who have not been vaccinated.

A comparatively recent decision is *King* v. *Concordia Fire Ins. Co.*, 103 N. W. Rep., 616 (Mich., 1905), in which it is held that the legislature cannot delegate to an insurance commission authority to draft a form of standard fire insurance policy, the use of which should be obligatory under penalty. An interesting feature of this case is that apparently no counsel could be found who would maintain the constitutionality of the law.

The foregoing review of the principles enunciated by this court indicates clearly the invalidity of the regulations made by the Secretary of Agriculture in the premises. The Act of May 29, 1884, 23 Stat., 31, 3 U. S. Comp. Stat., 1901, p. 3183, so far as it regulated this subject comprised Secs. 4 to 9, inclusive.

The Act of February 2, 1903, 32 Stat., 791, Supplement 1905 to U. S. Comp. Stat. aforesaid, p. 613, confers upon the Secretary of Agriculture the powers conferred by Secs. 4 and 5 of the aforesaid Act of May 29, 1884, upon the Secretary of the Treasury.

Secs. 4 and 5, of the Act of May 29, 1884, aforesaid, read:

"Sec. 4. That in order to promote the exportation of live stock from the United States the Commissioner of Agriculture shall make special investigation as to the existence of pleuro-pneumonia, or any contagious, infectious or communicable disease, along the dividing-lines between the United States and foreign countries, and along the lines of transportation from all parts of the United States to ports from which live stock are exported, and make report of the results of such investigation to the Secretary of the Treasury, who shall, from time to time, establish such regulations concerning the exportation and transportation of live stock as the results of said investigations may require.

Sec. 5. That to prevent the exportation from any port of the United States to any port in a foreign country of live stock affected with any contagious, infectious, or communicable disease, and especially pleuro-pneumonia, the Secretary of the Treasury be, and he is hereby, authorized to take such steps and adopt such measures, not inconsistent with the provisions of this act, as he may deem necessary."

Accordingly, it appears that by Sec. 4 the Secretary of Agriculture is to make investigations and report results to the Secretary of the Treasury, "who shall, from time to time, establish such regulations concerning the exportation and transportation of live stock as the results of said investigations may require." That by Sec. 5 he is "authorized to take such steps and adopt such measures, not inconsistent with the provisions of this act, as he may deem necessary."

If these statutes do not confer upon the Secretary of Agriculture the power *to make laws* it is difficult to see what language could confer such power. He is authorized to make such regulations "as the results of said investigations may require." He is the judge as to what regulations the results of said investigations require, and is authorized to make such regulations. A broader power to legislate is inconceivable except one that disregards the result of investigations.

There are other provisions of the Act of May 29, 1884, to-wit, *Secs. 6, 7, 8 and 9*, but these impose no limitations upon the aforesaid authority of the Secretary.

Observing the Act of February 2, 1903, we find similar liberty in the Secretary. By it he is clothed with the powers recited in Secs. 4 and 5 of the Act aforesaid, and directed, from time to time, to establish such regulations concerning exportation and transportation from any place within the United States where he may have reason to believe such diseases may exist into and through any state or territory and to foreign countries "as he may deem necessary, and all such rules and regulations shall have the force of law."

This power is limited only by discretion of the Secretary, and his regulations are declared of the same force as "law." The Secretary is, therefore, as fully and completely as a Secretary could be, empowered to enact laws, a power which, under the Constitution, is the sole province of Congress. The statutes conferring such power upon the Secretary are therefore unconstitutional.

Sec. 2 of the Act of 1903 is equally broad in its dedi-

cation of power to the Secretary. It provides authority to him "to make such regulations and to take such measures as he may deem proper" to prevent the spread of contagion, etc., and then adds certain powers of destroying property "whenever in his judgment such action is advisable in order to guard against the introduction or spread of such contagion."

In conferring power upon the Secretary of Agriculture *Congress* did not declare that transportation of cattle from any section of the country to any other section should constitute an offense, nor declare *that transportation from an infected section to one not infected should constitute an offense,* and clothe the Secretary with power to ascertain and indicate by his regulations what sections of the country were and what were not infected, but Congress clothed the Secretary with power to make the enactment if the Secretary saw fit, and Congress consequently clothed the Secretary with power to prescribe an offense involving punishment, for although by Sec. 3 of the Act of February 2, 1903, it provides the penalty for "knowingly violating the provisions of this Act, or the orders or regulations made in pursuance thereof," there are no provisions of the Act which could be violated. The Act simply clothes the Secretary with certain powers, *it declares no offense.* By the Act, Congress abdicates its legislative functions except that it fulminates penalties against those who violate the laws which the Secretary may make pursuant to the authority conferred by the Act.

Our contention is enforced by a review of Secs. 6 and 7 of the Act of May 29, 1884 (23 St. L., 33; 3 U. S. Comp. St. 1901, p. 3184).

Sec. 6 forbids a railroad company or a vessel from receiving for transportation or exporting from one state or territory to another, etc., "any live stock affected with any contagious, infectious or communicable disease," etc., and forbids any person driving such stock, etc., "knowing them to be affected" with any such disease, with certain exceptions.

Sec. 7 directs the Commissioner of Agriculture to give certain notice, by publication, of infected districts, and for the punishment of persons "who shall knowingly violate the provisions of Sec. 6 of this Act."

It is obvious, therefore, that the only statute which *Congress enacted to prohibit transportation* was confined to live stock actually "affected with any contagious, infectious or communicable disease" and to persons "knowing them to be affected" with such disease. And this the court has said in a careful discussion of the Act of May 29, 1884.

Reid v. *Colorado*, 187 U. S., 137, 150 (1902).

Congress did not assume to forbid the transportation of live stock from a district of country supposed to be infected to some other district. The commissioner assumed to enact a law supplementing the legislation of Congress so as to extend the prohibition against transportation *from cattle infected to cattle coming from a district where the infection, much or little, existed.* The secretary, therefore, did exactly what was done by the Secretary of the Treasury in *Morrill* v. *Jones,* when he confined the exemption which Congress had conferred upon live stock imported for breeding

purposes to such live stock as would improve the breeds in the United States.

Almost this very question was carefully considered in *United States* v. *Hoover,* 133 Fed. R., 950 (1904). Defendant in that case moved an instruction of "not guilty" under the Act of May 29, 1884, which was granted. The court said (p. 951):

"The Act of Congress, then, being limited to cases where the animal was affected with an infectious or communicable disease, it was not within the power or authority of the Secretary of Agriculture to extend the Act, and by an order or regulation bring within its penal provisions matters which were not criminal by the terms of the act. *United States* v. *Eaton,* 144 U. S., 677, 12 Sup. Ct., 764, 36 L. Ed., 591; *U. S.* v. *Maid* (D. C.), 116 Fed., 650; *U. S.* v. *Blasingame* (D. C.), 116 Fed., 654; *Dent* v. *United States* (Ariz.), 71 Pac., 920."

The court then considered the Act of February 2, 1903, observing that it clothed the secretary with powers contained in Sections 4 and 5 of the Act of May 29, 1884, and concluded (p. 952):

"The act nowhere attempts to prohibit the shipment of animals which are free from disease, and if Congress intended to empower the Secretary of Agriculture to make rules and regulations the violation of which alone should constitute a crime it was an unconstitutional delegation of legislative authority. While Congress may authorize the executive head of any department of government to make binding rules and regulations which are administrative in character, it cannot delegate the authority to make laws. That power is by the Constitution vested in Congress alone."

The defects in the Congressional legislation upon this subject were pointed out last March by the Presi-

dent in his message to Congress of March 1, 1905, which is as follows:

"*To the Senate and House of Representatives:*

"Your attention is respectfully called to the necessity of passing some legislation at this session which will supplement existing law intended to prevent the spread of contagious diseases of animals from one state to another or to foreign countries. Two bills, each designed to cure defects in existing law, are now pending before the Congress. The measures are practically identical. These bills have been favorably reported by the Committees on Agriculture of both branches of Congress.

"Recent decisions of the Federal courts have held that the statutory powers of the Secretary of Agriculture are inadequate to enforce regulations that prohibit the interstate movement of animals which have been exposed to contagion, but which at the time of shipment have not developed visible signs of disease.

"The right of the Secretary of Agriculture to regulate interstate movement of animals exposed but not actually diseased must be recognized if the spread of such disease from state to state and to other countries is to be prevented; and yet this right has recently been attacked in two cases filed in the Supreme Court of the United States and the Secretary of Agriculture is advised that the court may hold that the existing law is not sufficiently clear as to the steps which may be taken to accomplish this object. Each of the bills referred to in this message is accompanied by an able report which points out the necessity from a legal standpoint for the enactment of this legislation.

"I fear if no remedial legislation be granted at this session that it may be impossible to continue to enforce the necessary measures for controlling this class of diseases and that serious widespread and irreparable injury will be caused to the live stock interests of the United States. If the Federal quarantine is rendered ineffective, state will quarantine against state, each requiring compliance with differing statutes; the way to market may be blocked or ren-

dered very difficult for shipments of live stock; contagious diseases of live stock may be so disseminated through the stock yards and channels of commerce that foreign countries will restrict the export of animals and possibly meats from the United States, all of which would be disastrous to the live stock industry.

"I therefore put in an earnest plea for early action in this matter and commend to your favorable consideration the two bills proposed by the Committee on Agriculture and referred to in this message.

THEODORE ROOSEVELT.

The White House, March 1, 1905."

Congress evidently agreed with the President in his views as to the necessity of corrective legislation. This legislation will be found in the Act of March 3, 1905—33 Stat. L., 1264; U. S. Comp. Stat., 1901, Supp. 1905, p. 617. The first four sections of the Act are evidently intended to avoid the defects which in the present Acts are made manifest in the previous legislation. The Act is as follows:

"Chap. 1496.—An Act to enable the Secretary of Agriculture to establish and maintain quarantine districts, to permit and regulate the movement of cattle and other live stock therefrom, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of Agriculture is authorized and directed to quarantine any state or territory or the District of Columbia, or any portion of any state or territory or the District of Columbia, when he shall determine the fact that cattle or other live stock in such state or territory or District of Columbia are affected with any contagious, infectious or communicable disease; and the Secretary of Agriculture is directed to give written or printed notice of the establishment of quarantine to the proper officers of railroad, steamboat or other transportation companies doing business in or through any quarantined state or

territory or the District of Columbia, and to publish in such newspapers in the quarantined state or territory or the District of Columbia, as the Secretary of Agriculture may select, notice of the establishment of quarantine.

Sec. 2. That no railroad company or the owners or masters of any steam or sailing or other vessel or boat shall receive for transportation or transport from any quarantined state or territory or the District of Columbia, or from the quarantined portion of any state or territory or the District of Columbia, into any other state or territory or the District of Columbia, any cattle or other live stock, except as hereinafter provided; nor shall any person, company or corporation deliver for such transportation to any railroad company, or to the master or owner of any boat or vessel, any cattle or other live stock, except as hereinafter provided; nor shall any person, company or corporation drive on foot, or cause to be driven on foot, or transport in private conveyance or cause to be transported in private conveyance, from a quarantined state or territory or the District of Columbia, or from the quarantined portion of any state or territory or the District of Columbia, into any other state or territory or the District of Columbia, any cattle or other live stock, except as hereinafter provided.

Sec. 3. That it shall be the duty of the Secretary of Agriculture, and he is hereby authorized and directed, when the public safety will permit, to make and promulgate rules and regulations which shall permit and govern the inspection, disinfection, certification, treatment, handling, and method and manner of delivery and shipment of cattle or other live stock from a quarantined state or territory or the District of Columbia, and from the quarantined portion of any state or territory or the District of Columbia, into any other state or territory or the District of Columbia; and the Secretary of Agriculture shall give notice of such rules and regulations in the manner provided in section two of this Act for notice of establishment of quarantine.

Sec. 4. That cattle or other live stock may be moved from a quarantined state or territory or the District

of Columbia, or from the quarantined portion of any state or territory or the District of Columbia, into any other state or territory or the District of Columbia, under and in compliance with the rules and regulations of the Secretary of Agriculture, made and promulgated in pursuance of the provisions of section three of this Act; but it shall be unlawful to move, or to allow to be moved, any cattle or other live stock from any quarantined state or territory or the District of Columbia, or from the quarantined portion of any state or territory or the District of Columbia, into any other state or territory or the District of Columbia, in manner or method or under conditions other than those prescribed by the Secretary of Agriculture.

Sec. 5. That every person who forcibly assaults, resists, opposes, prevents, impedes, or interferes with any officer or employe of the Bureau of Animal Industry of the United States Department of Agriculture in the execution of his duties, or on account of the execution of his duties, shall be fined not less than one hundred dollars nor more than one thousand dollars, or be imprisoned not less than one month nor more than one year, or by both such fine and imprisonment; and every person who discharges any deadly weapon at any officer or employe of the Bureau of Animal Industry of the United States Department of Agriculture, or uses any dangerous or deadly weapon in resisting him in the execution of his duties, with intent to commit a bodily injury upon him or to deter or prevent him from discharging his duties, or on account of the performance of his duties, shall, upon conviction, be imprisoned at hard labor for a term of not more than five years or fined not to exceed one thousand dollars.

Sec. 6. That any person, company, or corporation violating the provisions of sections two or four of this Act shall be guilty of a misdemeanor, and on conviction shall be punished by a fine of not less than one hundred dollars nor more than one thousand dollars, or by imprisonment not more than one year, or by both such fine and imprisonment.

Approved March 3, 1905."

We submit that the conclusions of the Federal Court above cited, and the fears of the President and Congress were well grounded, and that the previous Acts of Congress above reviewed are invalid as applied to this case.

The recovery against plaintiff in error in this case is based solely upon the transportation by it from a point south of the quarantine line established by the State of Tennessee and adopted by the Secretary, to a point north of that line, and it is not shown that the cattle were infected when received for transportation, nor even contended that plaintiff in error had any information, or intimation of any such infection, if it existed.

We accordingly submit that no case was made against plaintiff in error in the premises.

II.

Assuming, however, for argument's sake, the power of Congress under the Constitution to clothe the Secretary of Agriculture with the legislative power which he assumed to exercise in the premises, and treating the Secretary's regulation as a law, the action of the Secretary in adopting a quarantine line, theretofore established by the State of Tennessee, extending through the state from west to east, and forbidding transportation from points south to points north of the line, is invalid because an attempt to regulate purely *infra-state* commerce. Whatever may have been the intention of the framers of the Constitution as to the delegation to the Congress of the power to regulate

all commerce among the several states, it is now well settled by this court that Congress has no power to regulate *infra-state* commerce. When, therefore, a provision of an Act of Congress in assuming to regulate commerce covers as well *infra-state* as *inter-state* commerce, the action of Congress on the two classes of commerce being inseparable, must fail *in toto*.

Where a statute is couched in terms so broad as to exceed the limits of the power of the legislature to enact it, the court will not by construction limit the statute to the scope which might constitutionally be given it by the legislature, but will hold the statute unconstitutional.

U. S. v. *Reese*, 92 U. S., 214, 221 (1875).
Trade Mark Cases, 100 U. S., 82, 98, 99 (1879).
Allen v. *Louisiana*, 103 U. S., 80, 85 (1880).
U. S. v. *Harris*, 106 U. S., 629, 641, 642 (1882).
Poindexter v. *Greenhow*, 114 U. S., 270, 305 (1884).
Spreigue v. *Thompson*, 118 U. S., 90, 94 (1885).
Baldwin v. *Franks*, 120 U. S., 678, 685, 689 (1887).
Union Sewer Pipe Co. v. *Connolly*, 184 U. S., 540, 565 (1902).
James v. *Bowman*, 190 U. S., 127, 140 (1903).
U. S. v. *JuToy*, 198 U. S., 253, 262 (1905).

The regulation being invalid, even if it had the force of an Act of Congress, would be as nugatory as if never enacted.

In *U. S.* v. *Reese*, 92 U. S., 214, 221 (1875), the question presented was whether the statute providing pun-

ishment of election inspectors refusing to count the votes of citizens because of their race, color or previous condition of servitude could be made effective. This court said that the *Fifteenth Amendment* did not clothe Congress with power to penalize every wrongful refusal to receive the vote of a qualified elector at state elections, but such authority was restricted to the rejection of such vote because of race, color or previous condition of servitude. Finding that the statute exceeded the authority of Congress, this court said (p. 220):

"It remains now to consider whether a statute, so general as this in its provisions, can be made available for the punishment of those who may be guilty of unlawful discrimination against citizens of the United States, while exercising the elective franchise, on account of their race, etc.

"There is no attempt in the sections now under consideration, to provide specifically for such an offense. If the case is provided for at all, it is because it comes under the general prohibition against any wrongful act or unlawful obstruction in this particular. We are, therefore, directly called upon to decide whether a penal statute, enacted by Congress, with its limited powers, which is in general language broad enough to cover wrongful acts without as well as within the constitutional jurisdiction, can be limited by judicial construction so as to make it operate only on that which Congress may rightfully prohibit and punish. For this purpose, we must take these sections of the statute as they are. We are not able to reject a part which is unconstitutional and retain the remainder, because it is not possible to separate that which is unconstitutional, if there be any such, from that which is not. The proposed effect is not to be attained by striking out or disregarding words that are in the section, but by inserting those that are not now there. Each of the sections must stand as a whole, or fall

altogether. The language is plain. There is no room for construction, unless it be as to the effect of the Constitution. The question, then, to be determined is, whether we can introduce words of limitation into a penal statute so as to make it specific, when, as expressed, it is general only."

In the *Trade Mark Cases*, 100 U. S., 82, 98-99 (1879), the action of Congress would have been valid if confined to trade marks in inter-state commerce, but was broad enough to cover those employed in *infra-state* commerce; the statute was pronounced invalid. This court said (p. 98):

"It has been suggested that if Congress has power to regulate trade marks used in commerce with foreign nations and among the several states, these statutes shall be held valid in that class of cases, if no further. To this there are two objections: First, the indictments in these cases do not show that the trade marks which are wrongfully used were trade marks used in that kind of commerce. Second, while it may be true that when one part of a statute is valid and constitutional and another part is unconstitutional and void, the court may enforce the valid part where they are distinctly separable so that each can stand alone, it is not within the judicial province to give to the words used by Congress a narrower meaning than they are manifestly intended to bear in order that crimes may be punished which are not described in language that brings them within the constitutional power of that body. This precise point was decided in the case of *U. S.* v. *Reese*, 92 U. S., 214. In that case Congress had passed a statute punishing election officers who should refuse to any person lawfully entitled to do so the right to cast his vote at an election. This court was of the opinion that, as regarded the section of the statute then under consideration, Congress could only punish such denial when it was on account of race, color or previous condition of servitude."

A part of the language heretofore quoted was then quoted from *U. S.* v. *Reese.*

In *Spraigue* v. *Thompson,* 118 U. S., 90, 94 (1885), a Georgia pilot sued the owners of the steamer Saxon for pilotage claimed under state laws, and obtained judgment in the state court. Upon writ of error from this court the state law was held invalid as inconsistent with Federal laws covering the same subject. The state court had held the statute valid in part and invalid in the residue, and this Court said:

"It was held, however, by the Supreme Court of Georgia, in the case now before us, that so much of the section as makes these illegal exceptions may be disregarded, so that the rest of the section as thus read may stand, upon the principle that a separable part of a statute which is unconstitutional may be rejected, and the remainder preserved and enforced. But the insuperable difficulty with the application of that principle of construction to the present instance is, that by rejecting the exceptions intended by the legislature of Georgia the statute is made to enact what confessedly the legislature never meant. It confers upon the statute a positive operation, beyond the legislative intent and beyond what anyone can say it would have enacted in view of the illegality of the exceptions. We are, therefore, constrained to hold that the provisions of section 1512 of the Code of Georgia cannot be separated so as to reject the unconstitutional exceptions merely, and that the whole section must be treated as annulled and abrogated by section 4237 of the Revised Statutes."

This court, accordingly, concluded that the "Saxon" was not liable for pilotage under the Georgia statute.

In *Baldwin* v. *Franks,* 120 U. S., 678, 685 (1887), if the statute had been limited to punish such acts as had actually been committed, it would probably have been constitutional.

A review of the other cases cited *supra* seems unnecessary. From the language of this court above quoted it appears that even an Act of Congress covering legitimate as well as illegitimate fields of legislation in a single provision cannot be rendered effective by holding it invalid as to the field wherein Congress had no power to legislate. One reason invoked for the conclusion reached by this court is that to reject the legislation so far as it were invalid would amount to substituting legislation by the court for that by Congress. This court's words in the *Trade-mark Cases* were (100 U. S., 99):

"To limit this statute as now asked for would be to make a new law, not to enforce an old one. This is no part of our duty. If we should, in the case before us, undertake to make by judicial construction a law which Congress did not make, it is quite probable we should do what, if the matter were now before that body, it would be unwilling to do, namely, make a trade mark law which is only partial in its operation, and which would complicate the rights which parties would hold, in some instances under the Act of Congress, and in others under state law. Cooley, Const. Lim., 178, 179; *Com.* v. *Hitchings,* 5 Gray (Mass.), 482."

In *Connolly* v. *Union Sewer Pipe Co.,* 184 U. S., 540, 565 (1902), this court declared void the Illinois statute denouncing trusts except effected by farmers, and held that the exception could not be rejected in order to render the statute valid, saying:

"If the latter section be eliminated as unconstitutional, then the Act, if it stands, will apply to agriculturalists or live stock dealers. Those classes would in that way be reached and fined, when evidently the legislature intended that they should not be regarded as offending against the law even if they did combine their capital, skill, or acts in respect of their products or stock in hand, etc." (p. 565.)

In the regulation now under review the Secretary of Agriculture in the same breath forbade transportation of live stock from a point south of the quarantine line to a point north of that line in the State of Tennessee, and such transportation from the same point or points south of the line to points north thereof beyond the northern boundary of Tennessee, by the same declaration making prohibition of transportation from points south to points north of the line, whether within or without the State of Tennessee. The regulation or enactment, therefore, is invalid so far as it includes transportation wholly within the State of Tennessee from points south to points north of the line, and to render it valid this court must revise it by adding thereto the provision that the prohibition shall be limited to transportation from points south of Tennessee to points north of the quarantine line and to transportation from points south of the quarantine line to points north of the State of Tennessee, so as to confine the regulation to inter-state transportation. That such treatment of the regulation is unauthorized is settled by the decisions of this court hereinbefore cited. In the language of this court "to limit this statute as now asked for would be to make a new law, not to enforce an old one," and as further said would be to do what "it is quite probable if the matter were now before that body, it would be unwilling to do."

These cattle were transported over the Illinois Central Railroad running through Fulton, Kentucky, a city upon the boundary line between Kentucky and Tennessee. Fulton extends into both states, as this Court judicially knows. There may be stock yards in

Tennessee and stock yards in Kentucky all within the City of Fulton. It is highly improbable that the Secretary would forbid transportation to the stock yards in Fulton in Kentucky if unauthorized to forbid such transportation to stock yards in Fulton in Tennessee. At any rate, it is probable that he would refrain from forbidding the transportation in one case if unable to forbid it in the other. The principle, therefore, upon which this court condemned the enactments in the *Trade-Mark Cases* and *Connolly* v. *Union Sewer Pipe Company* is exactly applicable here. The regulation is, therefore, invalid and can afford no basis for any action against anyone under it. We, accordingly, submit that defendant in error has no cause of action under the regulation and his petition should have been dismissed by the state court.

III.

As aforesaid, the only sanction for enforcement of the Acts of Congress, or regulations of the Secretary of Agriculture aforesaid which Congress has provided is the penalty of fine and imprisonment. No private right of action for damages supposed to have been sustained by violation of the acts or regulations is conferred by Congress. None, therefore, exists. When Congress intends private action for damages to exist it so provides, as in "*The Act to Regulate Commerce.*" From the imposition of the penalty, or the declaration by Congress of a penal offense no right of action accrues. The right of action arising out of an Act of Congress is a Federal right, and must be conferred

by Congress or it does not exist. It would require, therefore, an amendment of the statute, to originate a private right of action in an individual supposed to be injured by an act forbidden by Federal statute, to clothe such individual with a right of action. It is the province of Congress to fix penalties for the commission of offenses created by Federal statutes, *and the penalties imposed are assumed to be commensurate with the gravity of the offenses.* To add to such penalties the right of private action the resulting penalties might far exceed the penalties commensurate with the gravity of the offense. The courts, therefore, will not imply for doing an act forbidden by Act of Congress a penalty not provided in the Act, by adjudicating the existence of a private right of action in favor of someone supposed to be injured by the act done.

"Where a statute creates a new right or imposes a new duty or liability, unknown to the common law, and at the same time gives a remedy for its enforcement, the remedy so prescribed is exclusive." 2 Lewis' Sutherland Stat. Const., Sec. 720, p. 1310 (1904).

The rule is so well established in the Federal courts that where a statute changing the common law prescribes a penalty no civil action can be maintained for doing the acts which give rise to the penalty, it seems unnecessary to do more than to cite some of the cases so holding.

Dollar Savings Bank v. *U. S.*, 19 Wall., 227, 238 (1873).

Haycraft v. *U. S.*, 22 Wall., 81, 98 (1874).

Pollard v. *Bailey*, 20 Wall., 520, 527 (1874).

Farmers' Nat'l Bank v. *Dearing*, 91 U. S., 29, 35 (1875).

Barnet v. *Nat. Bank*, 98 U. S., 555, 558 (1878).

Stephens v. *Monongahela Bank*, 111 U. S., 197 (1884).

Carter v. *Carusi*, 112 U. S., 478, 483 (1884).

McBrown v. *Scottish Investment Co.*, 153 U. S., 318, 325 (1894).

Central Stock Yards v. *L. & N. R. Co.*, 112 Fed. Rep., 823, 826 (1902).

Conclusion.

For the foregoing reasons we respectfully ask a reversal of the judgment of the Carlisle Circuit Court, for the State of Kentucky.

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